(9)

No. 02-1541

Supreme Court, U.S.
FILED
DEC 11 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ of Certiorari to the Iowa Supreme Court

BRIEF FOR RESPONDENT

LINDA DEL GALLO
State Appellate Defender

THERESA R. WILSON *
Assistant Appellate Defender
Lucas Building, 4th Floor
321 East 12th Street
Des Moines, IA 50319
(515) 281-8841

* Counsel of Record

Attorneys for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Under the Sixth and Fourteenth Amendments to the United States Constitution, may the Iowa Supreme Court ensure a voluntary and intelligent waiver of counsel by requiring a district court to advise a pro se defendant who wishes to plead guilty of the usefulness of an attorney and the dangers of self-representation, specifying that an attorney may provide an independent opinion as to whether it is wise to plead guilty and that without an attorney the defendant may overlook a potential defense?

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE RIGHT TO COUNSEL IS ESSENTIAL TO THE FUNDAMENTAL FAIRNESS OF CRIMINAL PROCEEDINGS AND THE RELIABILITY OF CRIMINAL CONVICTIONS	5
A. The United States Supreme Court has long recognized the need for representation by counsel to ensure the fairness of criminal proceedings	5
B. The right to counsel is no less important to a defendant who ultimately chooses to plead guilty	8
C. Nonetheless, a defendant may proceed without counsel so long as he voluntarily and intelligently waives his right to counsel	10
II. CONTRARY TO PETITIONER'S ASSERTION, A GUILTY PLEA COLLOQUY, STANDING ALONE, IS NOT SUFFICIENT TO ENSURE A VOLUNTARY AND INTELLIGENT WAIVER OF PLEA COUNSEL	12

TABLE OF CONTENTS—Continued

Page

A. A guilty plea colloquy focuses on the trial-related rights a defendant waives by pleading guilty, and gives no attention to the right to have counsel at the plea proceeding 12

B. Advising a defendant of the relevant circumstances and likely consequences of pleading guilty does not advise a defendant of his right to plea counsel, the usefulness of plea counsel, and the dangers of proceeding without plea counsel..... 14

C. The need for a separate discussion regarding the right to plea counsel is especially important for those unfamiliar with the legal system 15

D. The Iowa Supreme Court's decision complied with the requirements of *Patterson* by specifically addressing the usefulness of counsel at a plea proceeding when analyzing the sufficiency of Tovar's purported waiver of counsel..... 17

III. THE DECISION OF THE IOWA SUPREME COURT WILL NOT HAVE A SUBSTANTIALLY ADVERSE IMPACT ON THE GOVERNMENT'S ABILITY TO PUNISH CRIMINAL OFFENDERS 19

A. Although Petitioner does have an interest in punishing repeat offenders, enforcement of recidivist statutes may not circumvent the right to counsel 19

TABLE OF CONTENTS—Continued

Page

B. Uncounseled convictions could still be used in the prosecution of offenses..... 22

C. Arguably, Petitioner may also attempt to prove up the conduct underlying the uncounseled conviction in seeking a harsher sentence within the applicable sentencing range 23

D. The waiver discussion proposed by the Iowa Supreme Court will not inhibit the plea process..... 24

E. Petitioner exaggerates the burden the Iowa Supreme Court's decision will have on prosecution of enhanced offenses..... 25

CONCLUSION 28

APPENDIX 1a

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) (Douglas, J., dissenting) 8, 10, 27
Alabama v. Shelton, 535 U.S. 654 (2002) 2, 7
Argersinger v. Hamlin, 407 U.S. 25 (1972) ...2-3, 7, 9, 19
Baldasar v. Illinois, 446 U.S. 222 (1980) (Marshall, J. concurring), *overruled by Nichols v. United States*, 511 U.S. 738 (1994) 21
Betts v. Brady, 316 U.S. 455 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963) 6
Boyd v. Dutton, 405 U.S. 1 (1972)(per curiam) 8, 14
Boykin v. Alabama, 395 U.S. 238 (1969) 12
Brady v. United States, 397 U.S. 742 (1970) 3, 8, 10
Brewer v. Williams, 430 U.S. 387 (1977)..... 10
Burgett v. Texas, 389 U.S. 109 (1967) 4, 19, 20
Carnley v. Cochran, 369 U.S. 506 (1962).....8, 9, 14
Carter v. Illinois, 329 U.S. 173 (1946)..... 8, 14
Custis v. United States, 511 U.S. 485 (1994) 20
Daniels v. United States, 532 U.S. 374 (2001)..... 20, 21
Ewing v. California, 538 U.S. 11 (2003)..... 19
Faretta v. California, 422 U.S. 806 (1975).....3, 10, 15
Gideon v. Wainwright, 372 U.S. 335 (1963)..... 3, 6, 7
Hamilton v. Alabama, 368 U.S. 52 (1961) 8
Johnson v. Zerbst, 304 U.S. 458 (1938).....5-6, 10, 20, 27
Kercheval v. United States, 274 U.S. 220 (1927).. 8
Lackawanna County Dist. Atty. v. Coss, 532 U.S. 394 (2001)..... 21
Lewis v. United States, 445 U.S. 55 (1980).....4, 20, 22
Loper v. Beto, 405 U.S. 473 (1972)..... 20
McCarthy v. United States, 394 U.S. 459 (1969).. 27
McMann v. Richardson, 397 U.S. 759 (1970)..... 12
Miranda v. Arizona, 384 U.S. 436 (1966)..... 16
Nichols v. United States, 511 U.S. 738.....4, 19, 21, 23
Parke v. Raley, 506 U.S. 20 (1992)..... 20, 27

TABLE OF AUTHORITIES—Continued

Page

Patterson v. Illinois, 487 U.S. 285 (1988)..... 3-4, 10-11, 15, 18
Powell v. Alabama, 287 U.S. 45 (1932) 6, 27, 28
Rice v. Olson, 324 U.S. 786 (1945)..... 3, 8
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ... 10
Scott v. Illinois, 440 U.S. 367 (1979) 7
Tomkins v. Missouri, 323 U.S. 485 (1945)..... 8
United States v. Cronic, 466 U.S. 648 (1984) 7
United States v. Watts, 519 U.S. 148 (1997) 23
United States v. Ruiz, 536 U.S. 622 (2002) 10
United States v. Tucker, 404 U.S. 443 (1972) 20, 23
Von Moltke v. Gillies, 332 U.S. 708 (1948).....3, 8, 10, 15, 16
Walker v. Johnston, 312 U.S. 275 (1941)..... 10
Wheat v. United States, 486 U.S. 153 (1988)..... 13
Williams v. Kaiser, 323 U.S. 471 (1945)..... 9, 25
Williams v. New York, 337 U.S. 241 (1949)..... 23

STATE CASES

Hatten v. Texas, 89 S.W.3d 160 (Tex., 2002) 26
Saylor v. State, 335 N.E.2d 826 (Ind. 1975)..... 26
State v. Cooley, 608 N.W.2d 9 (Iowa 2000).....5, 26, 27
State v. Draper, 457 N.W.2d 606 (Iowa 1990) 5, 27
State v. Guidry, 709 So.2d 233 (La. 1998)..... 26
State v. Longo, 608 N.W.2d 471 (Iowa 2000)..... 23
State v. Myers, 653 N.W.2d 574 (Iowa 2002)..... 12
State v. Nelson, 234 N.W.2d 368 (Iowa 1975)..... 27
State v. Talbert, 622 N.W.2d 297 (Iowa 2001) 22
State v. Yarborough, 536 N.W.2d 493 (Iowa Ct. App. 1995)..... 12
State v. Werner, 600 N.W.2d 500 (Neb. 1999) 26
State v. Witham, 583 N.W.2d 677 (Iowa 1998)..... 24
Watts v. State, 257 N.W.2d 70 (Iowa 1977)..... 5, 27

TABLE OF AUTHORITIES—Continued

CONSTITUTION — Page

U.S. Const. amend. VI ..... i, 5
U.S. Const. amend. XIV i

STATE STATUTES

Iowa Code § 321J.2(2)(b)-(c) (1999 Supp.) 20
Iowa Code § 321J.2(4)(a) (2003) 26
Iowa Code § 321.12(4) (2003) 26
Iowa Code § 708.2A(5)(a) (2003) 26
Iowa Code § 708.7(2)-(3) (2003) 26
Iowa Code § 815.9(1)(c) (1995) 13, 1a
Iowa Code § 815.10(2) (1995 Supp.) 13, 1a
Iowa Code § 902.9(5) (1999 Supp.) 22, 2a
Iowa Code § 903.1(2) (1999 Supp.) 22, 2a
N.C. Gen. Stat. § 7A-457 (2003) 25
W. Va. Code § 62-3-1a (2003) 25

STATE RULES

Ala. R. Crim. P. 14.4(a) (2003) 25
Colo. R. Crim. P. 11(c) (1998) 25
Haw. R. Crim. P. 43(c)(6) (2003) 25
Idaho R. Misd. 6(a)(3) (2003) 25
Iowa R. Crim. P. 2.8(2)(b) (2003) 3, 12, 24, 25
Iowa R. Crim. P. 2.19(9) (2003) 26, 2a
Mich. R. Crim. P. 6.610(D)(3) (2003) 25
Minn. R. Crim. P. 5.02(1)(3)-(4) (2003) 25
Nev. 2nd Judicial Dist. Crim. R. 4(a) (2003) 25, 26
Pa. R. Crim. P. 550 (c) (2003) 26

OTHER AUTHORITIES

Sourcebook of Criminal Justice Statistics Online 2001, http://www.albany.edu/sourcebook/1995/pdf/t518.pdf, Table 5.18 15

IN THE

Supreme Court of the United States

No. 02-1541

STATE OF IOWA,
Petitioner,

v.

FELIPE EDGARDO TOVAR,
Respondent.

On Writ of Certiorari to the Iowa Supreme Court

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent Felipe Tovar accepts Petitioner's statement of the facts and procedural posture as essentially correct, with two exceptions.

Petitioner states the District Court "commenced a guilty plea colloquy," and said to Tovar "I see, Mr. Tovar, that you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?" Pet'r Br. 3. At the time the District Court noted Tovar waived application for a court appointed attorney, Tovar had not yet offered any plea. J.A. 8-9. The District Court did not begin the colloquy required for acceptance of guilty pleas until the District Court asked Tovar how he wished to plead and Tovar replied "Guilty." J.A. 9, 11. At no time from the initial offering of

Tovar's plea of guilty through the court's acceptance of the plea did the District Court specifically advise Tovar that he could have counsel present prior to and during entry of his guilty plea. J.A. 9-30.

Petitioner states it became clear that Tovar was not indigent when he was denied counsel at the sentencing hearing because he was dependent upon his parents. Pet'r Br. 7. Tovar disputes whether the District Court made an adequate inquiry into his indigency status.

SUMMARY OF ARGUMENT

Respondent Felipe Tovar and Petitioner agree on several points. Both agree Tovar had a constitutional right to counsel when he entered his 1996 guilty plea. Pet'r Br. 34-35. Both agree that to proceed without counsel, Tovar had to make a voluntary and intelligent waiver of his right to counsel. Pet'r Br. 13-15.

Tovar and Petitioner disagree as to what is required for a voluntary and intelligent waiver of counsel prior to and during entry of a guilty plea. Petitioner suggests the colloquy used for the acceptance of guilty pleas is sufficient to waive counsel. Pet'r Br. 23-25. Tovar asserts that the guilty plea colloquy is insufficient because it does not address the role an attorney could serve and the assistance he could provide prior to and during entry of the plea. Rather, a defendant should be advised that he has a right to an attorney and that by waiving an attorney he risks overlooking potential defenses and will lose an independent opinion as to the wisdom of pleading guilty. The judgment of the Iowa Supreme Court should be affirmed.

1. Under the Sixth and Fourteenth Amendments to the United States Constitution, criminal defendants in state proceedings are entitled to the assistance of counsel before imprisonment can be imposed. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002); *Argersinger v. Hamlin*, 407 U.S. 25, 37

(1972); *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963). This right attaches to a guilty plea proceeding. *Rice v. Olson*, 324 U.S. 786, 788 (1945). Assistance of counsel at a guilty plea assists the defendant by providing him with an intelligent assessment of the relative advantages of pleading guilty and by protecting him from coercive conduct by the State. *Argersinger v. Hamlin*, 407 U.S. at 34; *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970).

Nonetheless, a defendant may proceed without counsel so long as he validly waives his right to counsel. Such a waiver must be a voluntary, knowing and intelligent act done with sufficient awareness of the relevant circumstances, the likely consequences, and the dangers of self-representation. *Faretta v. California*, 422 U.S. 806, 835 (1975); *Brady v. United States*, 397 U.S. at 748. A court must make a thorough investigation regarding a defendant's waiver of counsel; it is not enough for a defendant to say he wishes to waive his right. *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948). The waiver inquiry should take into consideration the purposes a lawyer can serve and the assistance he could provide to an accused at the stage of the proceedings for which the right to counsel is being waived. *Patterson v. Illinois*, 487 U.S. 285, 298 (1988).

2. A guilty plea colloquy is not sufficient to advise a pro se defendant of his right to have counsel present prior to and during entry of his guilty plea. A guilty plea colloquy focuses on the nature of the charges, the potential punishments, and the trial rights a defendant waives by pleading guilty. *See* Iowa R. Crim. P. 2.8(2)(b) (2003). Pet. 3-4. It in no way informs a defendant of the right to plea counsel, or of the usefulness of plea counsel.

A separate yet brief discussion of the availability and usefulness of plea counsel will make defendants aware of their right to counsel prior to the entry of a guilty plea. This is particularly important for first-time misdemeanor defendants,

who may be completely unfamiliar with the legal system and unaware of their right to have counsel during plea proceedings.

The waiver discussion proposed by the Iowa Supreme Court complies with established precedent by considering the particular usefulness of counsel during plea proceedings. *Patterson v. Illinois*, 487 U.S. at 298. *See* Pet. App. 13-19. The Court recognized counsel's role at plea proceedings as "multi-faceted" and suggested that defendants seeking to waive plea counsel be advised that by doing so they risk losing an independent opinion as to their case and risk overlooking potential defenses. Pet. App. 15-19. Such a discussion would adequately inform a pro se defendant of the usefulness of counsel at plea proceedings and the dangers of proceeding without counsel.

3. The waiver discussion proposed by the Iowa Supreme Court would not unduly burden Petitioner's interest in punishing repeat offenders. It is well settled that Petitioner would not be able to use uncounseled convictions lacking a valid waiver of counsel for the purposes of sentencing enhancement. *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967). Nonetheless, Petitioner could arguably use such convictions as elements of later prosecutions, depending on the language of the applicable statute. *Lewis v. United States*, 445 U.S. 55, 65-67 (1980). Petitioner could also seek more severe sentences within the otherwise applicable sentencing range by presenting independent proof of the conduct underlying the uncounseled conviction. *Nichols v. United States*, 511 U.S. 738, 748 (1994).

The waiver discussion will not inhibit the plea process. Such a discussion will not prevent a defendant from entering a guilty plea, but will ensure that he is aware of his right to counsel before he does so.

Finally, the waiver discussion proposed by the Iowa Supreme Court will not unduly burden the prosecution of enhanced offenses. Unless a defendant is directly attacking his uncounseled conviction, the defendant will have the initial burden of showing that he was not represented by counsel and did not waive counsel. *Compare State v. Cooley*, 608 N.W.2d 9, 14 (Iowa 2000)(holding State has burden to show valid waiver of counsel on direct appeal) *with State v. Draper*, 457 N.W.2d 606, 610 (Iowa 1990)(holding defendant had obligation to raise prima facie case as to infirmity of prior conviction before burden would shift to State). On collateral review, a defendant seeking to challenge his conviction would have to establish the facts supporting the invalid waiver by a preponderance of the evidence. *Johnson v. Zerbst*, 304 U.S. 458, 468-49 (1938); *Watts v. State*, 257 N.W.2d 70, 71 (Iowa 1977). Furthermore, the waiver colloquy proposed by the Iowa Supreme Court will assist Petitioner in the long term. If all courts follow this waiver discussion, there will be little question that a defendant was advised regarding the usefulness of plea counsel and the dangers of proceeding pro se.

ARGUMENT

I. THE RIGHT TO COUNSEL IS ESSENTIAL TO THE FUNDAMENTAL FAIRNESS OF CRIMINAL PROCEEDINGS AND THE RELIABILITY OF CRIMINAL CONVICTIONS.

A. The United States Supreme Court has long recognized the need for representation by counsel to ensure the fairness of criminal proceedings.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Prior to 1963, however, the

explicit protection of the Sixth Amendment was granted only to those defendants prosecuted under the federal system. *See Betts v. Brady*, 316 U.S. 455, 461-62 (1942)(declining to make the Sixth Amendment applicable to the States), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963).

Nonetheless, the United States Supreme Court recognized the importance of counsel to an accused and would sometimes extend the right to counsel to criminal defendants in state proceedings under the concept of due process. In analyzing a due process right to counsel, the Court looked at the totality of the circumstances, including the complexity of the charge and the age, background and education of the defendant. *See Betts v. Brady*, 316 U.S. at 462 ("Asserted denial is to be tested by an appraisal of the totality of facts in a given case); *Powell v. Alabama*, 287 U.S. 45, 60 (1932)(noting that defendants were "young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror").

In *Powell v. Alabama*, this Court stated that "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. at 68-69. Thus, due process required that an accused be given time and opportunity to secure counsel. *Id.* at 53. The Sixth Amendment, in particular, "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). The purpose of the Sixth Amendment is to protect defendants from convictions obtained based upon their "own ignorance of [their] legal and constitutional rights." *Id.* at 465.

In 1963, the right to assistance of counsel was recognized as a fundamental right and made applicable to the States via the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Considering the "vast sums of money" spent by governments to prosecute defendants and by defendants to hire lawyers, the *Gideon* Court proclaimed that "lawyers in criminal courts are necessities, not luxuries." *Id.* at 346.

Although *Gideon* dealt with a felony prosecution, the right to counsel is not limited to defendants charged with felonies. In *Argersinger v. Hamlin*, the right to counsel was extended to any criminal defendant facing imprisonment, regardless of whether the offense is classified as a felony or a petty offense. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). The *Argersinger* Court was unconvinced that "legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." *Id.* at 33. The Court was also concerned that the sheer volume of misdemeanor cases would create "an obsession for speedy dispositions, regardless of the fairness of the result." *Id.* at 34.

More recently, the right to counsel was extended to any offense in which a defendant received a suspended term of imprisonment. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002)(extending the actual imprisonment standard adopted in *Scott v. Illinois*, 440 U.S. 367 (1979)). In *Alabama v. Shelton*, this Court held that a suspended sentence could not be imposed against a defendant who was deprived of counsel during the underlying proceedings, as the proceedings had not been "subjected to 'the crucible of meaningful adversarial testing.'" *Id.* at 658, 667 (*quoting United States v. Cronic*, 466 U.S. 648, 656 (1984)).

B. The right to counsel is no less important to a defendant who ultimately chooses to plead guilty.

The right to counsel attaches at all critical stages of a criminal proceeding, from arraignment through sentencing. *Carter v. Illinois*, 329 U.S. 173, 174 (1946). This includes a guilty plea proceeding. *Boyd v. Dutton*, 405 U.S. 1, 2 (1972)(per curiam); *Rice v. Olson*, 324 U.S. 786, 788 (1945). Where the assistance of counsel is constitutionally required, a defendant does not have to make a specific request for counsel. *Carnley v. Cochran*, 369 U.S. 506, 513 (1962).

This Court has addressed the particular usefulness of counsel at plea proceedings. "A plea of guilty is different in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction." *Kercheval v. United States*, 274 U.S. 220, 223 (1927). The determination of guilt can be a complex legal task even for an educated and intelligent layperson. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). The issue of guilt may turn on the legal construction of a statute, rather than admitted facts. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 285 (1942) (Douglas, J., dissenting). "[A]n intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970). An accused is entitled to rely on counsel to make an independent examination of the facts, circumstances and law and to offer an informed opinion as to which plea should be entered. *Von Moltke v. Gillies*, 332 U.S. at 721. Sometimes, only the presence of counsel can enable a defendant to "know all the defenses available to him and to plead intelligently." *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961). "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify." *Tomkins v. Missouri*, 323 U.S. 485, 489 (1945).

The provision of counsel during a guilty plea also protects a defendant from coercive conduct by the prosecution. "Counsel is needed [at a plea proceeding] so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972). Particularly with misdemeanor offenses, where the desire for speedy dispositions may taint the fairness of the result, the presence of counsel may have a dramatic impact on the result of the proceedings. *Id.* at 34, 37 (citing study that found misdemeanants represented by counsel were five times more likely to get their charges dismissed than were pro se defendants). A trial judge cannot effectively discharge the role of both judge and defense counsel. *Carnley v. Cochran*, 369 U.S. 506, 510 (1962).

The importance of counsel at plea proceedings was perhaps most cogently explained in *Williams v. Kaiser*:

> The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment.

Williams v. Kaiser, 323 U.S. 471, 475-76 (1945)(citations omitted).

C. Nonetheless, a defendant may proceed without counsel so long as he voluntarily and intelligently waives his right to counsel.

Although an accused is entitled to the assistance of counsel at every critical stage of a criminal proceeding, an accused may choose to voluntarily and intelligently waive his right to counsel. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942). Such a waiver must be a voluntary, knowing, and intelligent relinquishment of a known right or privilege done with sufficient awareness of the relevant circumstances and likely consequences. *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Schneckloth v. Bustamonte*, 412 U.S. 218, 243-44 (1973); *Brady v. United States*, 397 U.S. 742, 748 (1970); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). An accused must be made aware of the dangers of self-representation so that the record establishes he knows what he is doing "'with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975). A judge has a duty to "investigate as long and as thoroughly as the circumstances of the case before him demand"; it is not enough for an accused to say that he has been informed of his right to counsel and wishes to waive it. *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948). A waiver of rights should appear in the court record; courts will indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. at 464-65. An invalid waiver of counsel is akin to a denial of counsel. *Walker v. Johnston*, 312 U.S. 275, 286 (1941).

In *Patterson v. Illinois*, the United States Supreme Court suggested that courts should take a pragmatic approach toward the waiver of counsel. *Patterson v. Illinois*, 487 U.S. 285, 298 (1988). The waiver inquiry must take into consideration "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage" before

a waiver will be recognized. *Id.* The Court defined "the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Id.*

In *Patterson*, the question was whether the accused was made "sufficiently aware of his right to have counsel present during [post-indictment] questioning, and of the possible consequences of a decision to forgo the aid of counsel." *Id.* at 292-93. Because the role of counsel at postindictment questioning is "rather unidimensional", *Miranda* warnings were sufficient to advise the defendant of the dangers of self-representation. *Id.* at 294. The *Patterson* Court recognized, however, that "an attorney's role at postindictment questioning is rather limited, and substantially different from the attorney's role in later phases of the criminal proceedings." *Id.* at 294 n.6.

Under *Patterson*, the nature of the colloquy a court must use to ensure a defendant voluntarily and intelligently waives counsel will change with the stage of the proceedings. The advice given to a defendant seeking to waive counsel at post-indictment questioning will not be the same advice given to a defendant seeking to waive counsel at trial, because the role of counsel at those proceedings is different. So, too, is the role of counsel at a guilty plea proceeding.

II. CONTRARY TO PETITIONER'S ASSERTION, A GUILTY PLEA COLLOQUY, STANDING ALONE, IS NOT SUFFICIENT TO ENSURE A VOLUNTARY AND INTELLIGENT WAIVER OF PLEA COUNSEL.

A. A guilty plea colloquy focuses on the trial-related rights a defendant waives by pleading guilty, and gives no attention to the right to have counsel at the plea proceeding.

A guilty plea waives certain constitutional rights, including the right against selfincrimination, the right to a jury trial, and the right to confrontation. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). It also waives the right to contest the government's evidence. *McMann v. Richardson*, 397 U.S. 759, 766 (1970). All of these rights are associated with trial and have little to do with advising a criminal defendant of the usefulness of plea counsel.

Likewise, the colloquy used to accept Tovar's guilty plea focused on his understanding of the trial rights he was waiving by pleading guilty and did not suffice to waive plea counsel. The plea colloquy used by the District Court complied with the colloquy for acceptance of guilty pleas outlined in Iowa Rule of Criminal Procedure 8(2)(b) (1992).[1] Pet'r Br. App. 1-2. Pursuant to the Rule, the District Court informed Tovar of the nature of the charge, the mandatory minimum and maximum possible punishment, the right to trial by jury, the right to assistance of counsel at trial, the

[1] The Iowa Rules of Criminal Procedure were renumbered after Tovar's 1996 guilty plea. The requirements of a guilty plea colloquy can now be found at Iowa Rule of Criminal Procedure 2.8(2)(b) (2003). *See* Pet. 3-4. Substantial compliance with the colloquy, not strict compliance, is required. *State v. Myers*, 653 N.W.2d 574, 578 (Iowa 2002)(felony guilty plea); *State v. Yarborough*, 536 N.W.2d 493, 496 (Iowa Ct. App. 1995)(misdemeanor guilty plea).

right to confront and cross-examine witnesses, the right against self-incrimination, and the right to present and compel witnesses in his defense. J.A. 12-20; Pet'r Br. App. 1-2. In addition, the District Court was required to advise Tovar that by pleading guilty he was waiving his right to a trial. J.A. 19; Pet'r Br. App. 2.

This colloquy provided Tovar with no discussion of the right to plea counsel and instead focused squarely on the trial rights Tovar waived by pleading guilty and the potential punishment he faced. The only discussion of the right to counsel was in the context of waiving counsel "at that trial." J.A. 16. In fact, at no time did the District Court specifically advise Tovar that he had a right to plea counsel, that plea counsel could be appointed for him if he were unable to hire an attorney,[2] and that plea counsel could be present prior to and during the entry of the guilty plea. The District Court did not engage Tovar in any meaningful discussion of the usefulness of plea counsel, nor did it advise Tovar of the

[2] Petitioner and *amicus* National District Attorneys Association appear to believe that Tovar's status as a non-indigent is of some relevance. Pet'r Br. 13; NDAA Amicus Brief i. First, Tovar questions his status as a non-indigent, given that he was denied counsel as an adult based upon his parent's support. J.A. 46. Second, the District Court seems to have given no consideration to any "substantial hardship" the denial of counsel may have caused, which could have allowed Tovar to be considered an "indigent" under Iowa law. Iowa Code § 815.9(1)(c) (1995). Resp't Br. App. 1. The statute also allowed the court to appoint counsel for Tovar if he was not indigent, wanted counsel, but refused to hire an attorney. Iowa Code § 815.10(2) (1995 Supp.). Resp't Br. App. 2. Third, Tovar's financial status was not addressed by the District Court until sentencing on the guilty plea. J.A. 46. Finally, the Sixth Amendment provides a constitutional right to assistance of counsel to all criminal defendants, not just those who need court-appointed counsel, and thus the advice given to criminal defendants would be the same in either circumstance. *See Wheat v. United States*, 486 U.S. 153, 159 (1988)(recognizing Sixth Amendment right to retain an attorney).

consequences of proceeding without counsel, as opposed to the consequences of merely pleading guilty.

B. Advising a defendant of the relevant circumstances and likely consequences of pleading guilty does not advise a defendant of his right to plea counsel, the usefulness of plea counsel, and the dangers of proceeding without plea counsel.

Petitioner mixes apples with oranges. Petitioner suggests that as long as Tovar was aware of the adverse consequences of pleading guilty without counsel—namely, that he faced certain conviction resulting in a set range of punishment—then Tovar had sufficient awareness of the relevant circumstances and ultimate consequences to create a valid waiver of plea counsel. Pet'r Br. 20, 24-25.

Petitioner essentially asks this Court to abolish the right to counsel for guilty pleas. If a guilty plea colloquy is sufficient to advise a pro se defendant of his right to plea counsel, then a court need never advise a defendant that he has a right to plea counsel or that if he cannot afford plea counsel, counsel would be appointed for him. All a court need do is follow the colloquy, focusing though it does on trial-related rights. The mere voluntary entry of the guilty plea would be enough to assume a valid waiver of plea counsel.

Unquestionably, a defendant has a right to be represented by counsel at a plea proceeding. *Boyd v. Dutton*, 405 U.S. 1, 2 (1972)(per curiam). To proceed pro se, a defendant must voluntarily and intelligently waive his right to plea counsel. Id. at 2-3. A waiver of counsel will not be presumed from an uncounseled defendant's appearance and plea of guilty. *Carnley v. Cochran*, 369 U.S. 506, 515-16 (1962). *But see Carter v. Illinois*, 329 U.S. 173, 176-77 (1946)(holding unchallenged finding that defendant pleaded guilty after a full apprisal of his rights). Nor is it enough for a defendant to say

he has been informed of his right to counsel and wishes to waive it. *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948). Rather, under *Patterson v. Illinois*, a valid waiver of plea counsel must address "the purposes a lawyer can serve" at the plea proceedings and "what assistance he could provide to an accused" at the plea proceeding. *Patterson v. Illinois*, 487 U.S. 285, 298 (1988).

The plea colloquy used by the District Court did not satisfy these minimum requirements. Petitioner implies that no such discussion was necessary because the usefulness of plea counsel is merely "subsidiary information." *See* Pet'r Br. 18-19 (noting case law does not permit invalidation of guilty pleas based upon a defendant's ignorance of subsidiary information). Information regarding the right to counsel, the usefulness of counsel, and the dangers of self-representation is not "subsidiary." It is required for an intelligent and voluntary waiver of counsel. *Patterson v. Illinois*, 487 U.S. at 298; *Faretta v. California*, 422 U.S. 806, 835 (1975).

C. The need for a separate discussion regarding the right to plea counsel is especially important for those unfamiliar with the legal system.

The need for a brief yet specific discussion of the right to plea counsel is perhaps even more important given that many guilty pleas are likely to involve first-time offenders facing misdemeanor charges. *See, e.g., Sourcebook of Criminal Justice Statistics Online 2001*, http://www.albany.edu/sourcebook/1995/pdf/t518.pdf, Table 5.18 (showing 54.9 percent of misdemeanor defendants convicted in U.S. District Courts had no prior convictions). These defendants may have little understanding of their right to plea counsel. They may be under a mistaken belief that they have a right to counsel if they proceeded to trial, but not if they wished to enter a guilty plea. The waiver discussion advanced by the Iowa Supreme Court would resolve this dilemma.

Tovar's case is a prime example of the need for a discussion of the right to counsel. Tovar did not merely appear for a pre-scheduled guilty plea proceeding. Rather, Tovar appeared for arraignment and chose to plead guilty at the arraignment. J.A. 8-9. At the time the District Court noted Tovar was appearing without counsel and asked Tovar if he wished to represent himself at the hearing, the District Court had no way of knowing whether Tovar intended to plead guilty or not guilty. Once Tovar stated his intent to plead guilty, the District Court did not advise Tovar that he had a right to plea counsel. J.A. 9-30. Tovar, like many first-time offenders, may have been under the mistaken belief that he had a right to counsel at trial, but not if he was merely going to plead guilty. Nothing in the District Court's discussion with Tovar would have dissuaded him from such a belief. The Court did not even inquire into whether Tovar was able to hire an attorney or why he did not want one. *See Von Moltke v. Gillies*, 332 U.S. 708, 718 (1948)("The judge appears not to have asked petitioner whether she was able to hire a lawyer, why she did not want one, or who had given her advice in connection with her plea").

In *Miranda v. Arizona*, this Court recognized that a warning advising a defendant of his right to remain silent makes a defendant aware of this right, "the threshold requirement for an intelligent decision as to its exercise." *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966). To be valid, however, the warning also had to advise a defendant not only of the right, but of the consequences of waiving it. *Id.* at 469. The *Miranda* Court recognized that any examination of a defendant's "age, education, intelligence or prior contact with authorities" can never be more than "speculation" when it comes to assessing a waiver of constitutional rights. *Id.* at 468-69. "[A] warning is a clearcut fact." *Id.* at 469. "The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel." *Id.* at 470-71.

Where defendants are unfamiliar with the legal system, yet face the potential for the deprivation of liberty, it is incumbent upon a trial or plea court to ensure they are adequately informed of their constitutional right to counsel and make a voluntary and intelligent decision to waive their right if they choose to do so. The waiver discussion proposed by the Iowa Supreme Court fulfills these goals so that no one need speculate whether a pro se defendant who ultimately pleaded guilty validly waived his right to counsel.

D. The Iowa Supreme Court's decision complied with the requirements of Patterson by specifically addressing the usefulness of counsel at a plea proceeding when analyzing the sufficiency of Tovar's purported waiver of counsel.

In its decision, the Iowa Supreme Court held that "a defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel." Pet. App. 18. This advice, according to the Iowa Supreme Court, should consist of advising the defendant: "generally that there are defenses to criminal charges that may not be known to laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked"; "that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty"; and regarding "the nature of the charges against him and the range of allowable punishments." Pet. App. 18. The Iowa Supreme Court specified that the trial judge was not to assume the role of an attorney and was not expected to discuss particular defenses with an accused. Pet. App. 18.

The decision of the Iowa Supreme Court followed the rationale of *Patterson* by considering the usefulness of counsel *at the plea proceeding*. *See Patterson v. Illinois*, 487 U.S. 285, 298 (1988)(holding that stage of proceedings is factor relevant to waiver inquiry). It held that "the discussion between Tovar and the court with respect to the usefulness of counsel at trial did not suffice to advise Tovar of the usefulness of counsel at the plea stage." Pet. App. 16. The Iowa Supreme Court specifically found that there was an "absence of any dialogue concerning the value of having an attorney when pleading guilty," that the trial court failed to alert Tovar to the dangers of entering a guilty plea without the advice of counsel, and that the court did not warn Tovar of the availability of legal defenses that "he, as a layperson, would not recognize." Pet. App. 16.

Instead of characterizing an attorney's role at a plea proceeding as unidimensional—advising a defendant whether to plead guilty or not guilty—the Iowa Supreme Court described the attorney's role as "multi-faceted." Pet. App. 15. "A lawyer will know what defenses might be available to the crime charged" and "what questions to ask to deter mine whether such defenses might be factually viable." Pet. App. 15.

Nor was the Iowa Supreme Court convinced that an attorney was of less use in an OWI case, where the concept of driving while intoxicated could be readily understood by non-lawyers. The Iowa Supreme Court recognized that the average layperson would likely be unaware of the proper procedures for invoking implied consent or grounds for suppressing evidence, "which is usually the only meaningful defense available." Pet. App. 15.

The Iowa Supreme Court's rationale with respect to the "simplicity" of the charge finds support in various United States Supreme Court decisions regarding the importance of counsel in misdemeanor cases. This Court has recognized that

the legal and constitutional questions involved in misdemeanor cases are no less complex simply because the charges are misdemeanors. *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972). Also, the volume of misdemeanor cases "may create an obsession for speedy dispositions, regardless of the fairness of the result." *Id.* In such cases, the presence of counsel may dissipate the coercive pressure to plead guilty. *Nichols v. United States*, 511 U.S. 738, 763 (1994).

The decision of the Iowa Supreme Court did not treat the Sixth Amendment right to counsel with mechanical rigidities, but addressed the particular concerns of the right to counsel at the plea proceeding.

III. THE DECISION OF THE IOWA SUPREME COURT WILL NOT HAVE A SUBSTANTIALLY ADVERSE IMPACT ON THE GOVERNMENT'S ABILITY TO PUNISH CRIMINAL OFFENDERS.

A. Although Petitioner does have an interest in punishing repeat offenders, enforcement of recidivist statutes may not circumvent the right to counsel.

Tovar agrees that Petitioner has a valid interest in punishing recidivists. *See generally, e.g., Ewing v. California*, 538 U.S. 11 (2003)(upholding California's three-strikes law against Eighth Amendment challenge and recognizing governmental interest in deterring recidivism). Nonetheless, this Court's precedent also clearly establishes that a government's interest in punishing recidivists should not compromise the fundamental right to counsel.

In *Burgett v. Texas*, this Court held that a conviction obtained in violation of the Sixth Amendment could not be used to either "support guilt or enhance punishment for another offense." *Burgett v. Texas*, 389 U.S. 109, 114-15

(1967). *But see Lewis v. United States*, 445 U.S. 55, 65-67 (1980)(holding uncounseled felony conviction obtained in violation of Sixth Amendment could be used in prosecution of defendant as felon in possession of firearm). The later use of such a conviction would erode the principle of *Gideon v. Wainwright* and allow a defendant to suffer anew from the deprivation of his Sixth Amendment right. *Burgett v. Texas*, 389 U.S. at 115. *See also United States v. Tucker*, 404 U.S. 443, 447-49 (1972)(holding sentencing judge could not impose harsher sentence based upon two convictions that were "wholly unconstitutional" under *Gideon*).

"Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a . . . court's authority to deprive an accused of his life or liberty." *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938). This Court has repeatedly recognized that convictions obtained in violation of the right to counsel, whether they result from outright denial of counsel or an invalid waiver of counsel, are unreliable, cannot be used to enhance sentences, and are subject to collateral attack. *See, e.g., Daniels v. United States*, 532 U.S. 374, 382 (2001)(recognizing right of collateral attack on prior convictions in habeas based upon *Gideon* violation); *Custis v. United States*, 511 U.S. 485, 496 (1994)(recognizing right to collaterally attack prior convictions based upon denial of appointed counsel); *Parke v. Raley*, 506 U.S. 20, 27 (1992)(recognizing uncounseled convictions cannot be used to support guilt or enhance punishment); *Loper v. Beto*, 405 U.S. 473, 483 (1972) (prohibiting use of prior convictions for impeachment purposes where defendant had been denied counsel); *United States v. Tucker*, 404 U.S. 443, 445, 448-49 (1972)(reversing sentence made more severe by court's consideration of defendant's prior uncounseled convictions where he had not been advised of counsel and had not waived counsel).

Of particular interest in Tovar's case is that the use of his prior uncounseled guilty plea would raise his present offense from an aggravated misdemeanor to a class D felony. *See* Iowa Code § 321J.2(2)(b)-(c) (1999).[3] Pet. 3. This Court has previously approached the issue of elevating misdemeanor offenses into felonies via uncounseled convictions with some concern. Justice Marshall's concurring opinion in *Baldasar v. Illinois* expressed concern that an uncounseled conviction was used to elevate an offense permitting no more than one year in jail "into a felony, with all the serious collateral consequences that a felony conviction entails." *Baldasar v. Illinois*, 446 U.S. 222, 227 (1980)(Marshall, J. concurring), *overruled by Nichols v. United States*, 511 U.S. 738, 749 (1994). Other cases have paid some attention to whether the uncounseled prior conviction changed the applicable sentencing range for the later offense. *See, e.g., Lackawanna County Dist. Atty. v. Coss*, 532 U.S. 394, 406-07 (2001) (holding that sentence was not "actually increased" by consideration of prior convictions); *Daniels v. United States*, 532 U.S. 374 (2001)(Souter, J. dissenting) (questioning why a defendant should be subjected to a higher sentencing range under the Armed Career Criminal Act); *Nichols v. United States*, 511 U.S. 738, 751 (Souter, J. concurring)(noting prior convictions did not play a conclusive role in choosing a sentencing range under the federal sentencing guidelines as a judge could allow a downward departure). In Tovar's case, the use of his prior uncounseled guilty plea would be conclusive; it would conclusively elevate his offense from an aggravated misdemeanor to a class D felony. Iowa Code § 321J.2(2)(b)-(c) (1999 Supp.). Pet. 3. It would conclusively elevate the applicable sentencing range from a range of from

---

[3] Although Petitioner cited the 2001 Iowa Code section, Tovar was actually charged under the 1999 Supplemental Code. Pet. 3; Pet. App. 38-41. This typographical error is of little relevance, though, given that the language of the statutes are identical.

seven days to two years imprisonment for an aggravated misdemeanor to a range of from 30 days to five years imprisonment for a class D felony. *Id.; id.* §§ 902.9(5), 903.1(2). Resp't Br. App. 2-3. In such cases, the reliability of the previous conviction should be of utmost importance, as the consequences of the earlier deprivation of counsel are severe.

B. Uncounseled convictions could still be used in the prosecution of offenses.

Although Petitioner would be barred from using uncounseled convictions for sentencing enhancements if counsel was not validly waived, Petitioner may still prosecute offenses where the uncounseled conviction would be an element of the offense. In *Lewis v. United States*, this Court held that a prior uncounseled felony conviction obtained in violation of the Sixth Amendment could be used as the basis for a later prosecution of the same defendant as a felon in possession of a firearm. *Lewis v. United States*, 445 U.S. 55, 65-67 (1980). Depending on the language of the applicable statute,[4] an uncounseled conviction obtained in violation of the Sixth Amendment may still be viable for a later prosecution. In such cases, Petitioner's interest in prosecuting repeat offenders is protected.

---

[4] The *Lewis* Court took notice of the fact the relevant federal firearms statute contained no language excepting from its prohibitions felons whose convictions might ultimately turn out to be constitutionally invalid. *Lewis v. United States*, 445 U.S. 55, 61-62 (1980).

Under Iowa law, a defendant's previous OWI convictions are not considered "elements" of a later enhanced OWI prosecution. *State v. Talbert*, 622 N.W.2d 297, 301 (Iowa 2001). Thus, *Lewis* would not permit the use of Tovar's 1996 guilty plea to enhance his current offense.

C. Arguably, Petitioner may also attempt to prove up the conduct underlying the uncounseled conviction in seeking a harsher sentence within the applicable sentencing range.

Tovar agrees that sentencing courts have great discretion and may rely on a wide range of information in determining a defendant's sentence. *United States v. Watts*, 519 U.S. 148, 151-52 (1997); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994); *Williams v. New York*, 337 U.S. 241, 246-47 (1949). In fact, a sentencing court may even consider conduct for which a defendant has been acquitted, so long as it is proven by a preponderance of the evidence. *United States v. Watts*, 519 U.S. at 156 (considering a sentence under the federal sentencing guidelines).

A conviction obtained in violation of the Sixth Amendment is facially unreliable for the purposes of enhancing punishment. *United States v. Tucker*, 404 U.S. 443, 447, 449 (1972). Even so, this would not necessarily prevent Petitioner from seeking harsher punishment within the applicable sentencing range if it could prove up the conduct underlying the otherwise invalid conviction through other, independent means. *See e.g., Nichols v. United States*, 511 U.S. at 748 ("Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense"). Iowa courts, for example, recognize that evidence of other criminal activity may be used in determining a defendant's sentence, so long as there is a sufficient record to establish the matters relied upon. *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000).

In this case, Petitioner cannot use Tovar's previous uncounseled guilty plea to raise the level of his offense from an OWI 2nd, a misdemeanor, to an OWI 3rd, a felony. Petitioner could, however, provide separate evidence of Tovar's conduct underlying his prior uncounseled conviction

to seek more severe punishment under the OWI 2nd sentencing range. For example, Petitioner could seek to introduce the trial information, minutes of testimony, blood alcohol test results, or an officer's affidavit or testimony at the sentencing hearing. *See e.g., State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998)(allowing sentencing court to consider pre-sentence investigation report that listed counseling for a previous incident of sex abuse where defendant did not challenge the report). Thus, even though Petitioner would be prevented from using the fact of Tovar's unreliable conviction to enhance his sentence, it still has means by which it could seek to punish Tovar more severely based upon independent proof of the underlying conduct. In this respect, Petitioner's interest in deterring and punishing repeated criminal conduct is preserved.

D. The waiver discussion proposed by the Iowa Supreme Court will not inhibit the plea process.

The decision of the Iowa Supreme Court will not inhibit the plea process. At most, it may take the plea court a few minutes to address a defendant and advise him of the usefulness of an attorney and the consequences of proceeding pro se, in addition to the colloquy already required for acceptance of the plea. This concern is further alleviated in misdemeanor cases, where the plea court may also accept a written plea of guilty and waiver of rights from a defendant pursuant to Iowa Rule of Criminal Procedure 2.8(2)(b) (2003). Pet. 3-4. If the waiver of counsel at the plea proceeding additionally appears in the written plea form and waiver of rights, it will not take a significant amount of time for the court to review the plea and waiver form personally with a defendant.

Furthermore, the argument that such a waiver discussion would "discourage the ready, unqualified admission of guilt" actually supports the need for such a discussion. Pet'r Br. 33.

If Petitioner is concerned that something the court says to a defendant will persuade him to reconsider his plea, then it is obviously information that a defendant believes is relevant to his decision-making process.

Tovar agrees that there are many reasons why an uncounseled defendant may wish to enter a guilty plea pro se. Pet'r Br. 32-33. Ignorance of his constitutional right to counsel, however, should not be one that is condoned by the courts. Nothing in the waiver discussion adopted by the Iowa Supreme Court would prevent a defendant who wants to "expeditiously accept responsibility" for his offense from doing so. Pet'r Br. 32. It would merely ensure that such a defendant was aware of the constitutional right to assistance of counsel prior to and during the entry of his guilty plea. "Prompt and expeditious detection and punishment of crime are necessary for the protection of society. But that may not be done at the expense of the civil rights of the citizen." *Williams v. Kaiser*, 323 U.S. 471, 476 (1945).

E. Petitioner exaggerates the burden the Iowa Supreme Court's decision will have on prosecution of enhanced offenses.

The decision of the Iowa Supreme Court will not create an undue burden for prosecutors. The practical difficulty of obtaining the court record of the previous proceeding is not as significant when the misdemeanor plea has been entered with the addition of a written plea and waiver of rights pursuant to Iowa Rule of Criminal Procedure 2.8(2)(b).[5] In these cases,

---

[5] Some of the other jurisdictions allowing a guilty plea to be entered, in whole or in part, via a written plea and waiver of rights include Alabama, Colorado, Hawaii, Idaho, Indiana, Iowa, Louisiana, Michigan, Minnesota, Nebraska, Nevada, Pennsylvania, Texas and West Virginia. N.C. Gen. Stat. § 7A-457 (2003); W. Va. Code § 62-3-1a (2003); Ala. R. Crim. P. 14.4(a) (2003); Colo. R. Crim. P. 11(c) (1998); Haw. R. Crim. P. 43(c)(6) (2003); Idaho R. Misd. 6(a)(3) (2003); Mich. R. Crim. P. 6.610(D)(3) (2003); Minn. R. Crim. P. 5.02(1)(3)-(4) (2003); Nev. 2nd Judicial Dist.

the waivers will appear in the court record, which is easily accessible. Although there may be more difficulty in obtaining a transcript, it is far from an impossibility. The transcript of Tovar's 1996 guilty plea and sentencing was, for example, made part of the record during his 2001 felony case. J.A. 6-56.

Notably, many enhancement offenses specify a time frame under which a previous conviction would qualify for enhancement. Under Iowa law, a previous conviction for domestic assault, for example, would not qualify to enhance a current offense if the previous conviction occurred more than six years prior to the current offense. Iowa Code § 708.2A(5)(a) (2003). A previous conviction for harassment would not qualify as an enhancing offense if it occurred more than 10 years prior to the current offense. *Id.* § 708.7(2)-(3). The Operating While Intoxicated chapter under which Tovar was convicted limits the enhancement timeline to previous OWI offenses occurring no more than 12 years prior to the current offense. *Id.* §§ 321J.2(4)(a), 321.12(4). With respect to these offenses, the risk that prosecutors would be unable to obtain the necessary record is minimal.

The Iowa Rules of Criminal Procedure provide that prior to sentencing on an enhanced offense, a defendant may object to the use of a prior uncounseled conviction on the ground he did not validly waive counsel. Iowa R. Crim. P. 2.19(9) (2003). Resp't Br. App. 3. Unless a defendant is directly attacking his uncounseled conviction, the defendant will have the initial burden of showing that he was not represented by counsel and did not waive counsel. *Compare State v. Cooley*, 608 N.W.2d 9, 14 (Iowa 2000)(holding State has burden to

---

Crim. R. 4(a) (2003); Pa. R. Crim. P. 550 (c) (2003); *Saylor v. State*, 335 N.E.2d 826 (Ind. 1975); *State v. Guidry*, 709 So.2d 233 (La. 1998); *State v. Werner*, 600 N.W.2d 500 (Neb. 1999); *Hatten v. Texas*, 89 S.W.3d 160 (Tex. 2002).

show valid waiver of counsel on direct appeal) *with State v. Draper*, 457 N.W.2d 606, 610 (Iowa 1990)(holding defendant had obligation to raise prima facie case as to infirmity of prior conviction before burden would shift to State) and *State v. Nelson*, 234 N.W.2d 368, 375 (Iowa 1975)(same). On collateral review, a defendant seeking to challenge his conviction would have to establish the facts supporting the invalid waiver by a preponderance of the evidence. *Johnson v. Zerbst*, 304 U.S. 458, 468-49 (1938); *Watts v. State*, 257 N.W.2d 70, 71 (Iowa 1977). *See also Parke v. Raley*, 506 U.S. at 31 (holding it appropriate to place burden of proof on a defendant seeking to collaterally attack a prior conviction). In these instances, where a defendant has the initial burden of supporting the infirmity of his prior conviction, the burden on prosecutors is minimal.

Finally, the waiver discussion indicated by the Iowa Supreme Court would actually assist Petitioner in the long run. If all courts were to follow the proposed waiver discussion at plea proceedings, there would be little question that a defendant was adequately advised and made aware of his right to counsel at the plea proceeding. By making a record of its waiver discussion with a defendant, a court would facilitate its own determination of the voluntary and knowing character of the waiver and also facilitate any determination of the issue in later challenges to the proceedings. *McCarthy v. United States*, 394 U.S. 459, 467 (1969). If defendants proceed to plead guilty after being advised of the usefulness of counsel at the plea stage and the consequences of proceeding without counsel at the plea stage, then the presumption is that they elected to plead guilty with "eyes open." *Adams v. United States ex rel McCann*, 317 U.S. 269, 279 (1943).

The Sixth Amendment was designed to protect an accused's rights to counsel and to a fair trial, not to ease the burden on prosecutors seeking convictions. *See Powell v.*

Alabama, 287 U.S. 45, 61-64 (1932)(discussing the history of the right to counsel in England and the colonies, and quoting an historical treatise that found the English common law practice of denying counsel to felony defendants was an expedient means for convicting the accused). The Iowa Supreme Court's decision is consistent with the intent of the Sixth Amendment and will not create undue hardship in the prosecution of offenses.

CONCLUSION

For all of the reasons discussed above, Respondent Felipe Tovar respectfully requests this Court affirm the decision of the Iowa Supreme Court.

Respectfully submitted,

LINDA DEL GALLO
State Appellate Defender

THERESA R. WILSON *
Assistant Appellate Defender
Lucas Building, 4th Floor
321 East 12th Street
Des Moines, IA 50319
(515) 281-8841

* Counsel of Record

Attorneys for Respondent

APPENDIX

APPENDIX

Iowa Code § 815.9 (1995)

1. For purposes of this chapter, section 68.8, section 222.22, chapter 232, chapter 814, and the rules of criminal procedure, the following apply:

a. A person is indigent if the person has an income level at or below one hundred fifty percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States department of health and human services.

b. A person is not indigent if the person has an income level greater than one hundred fifty percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States department of health and human services.

c. A person with an income level greater than one hundred fifty percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States department of health and human services may be deemed partially indigent by the court pursuant to a written finding that, given the person's circumstances, not appointing counsel at public expense would cause the person substantial hardship. However, the court shall require a person deemed partially indigent to contribute to the cost of representation in accordance with rules adopted by the state public defender.

Iowa Code § 815.10 (1995 Supp.)

* * *

2. If a court finds that a person desires legal assistance and is not indigent, but refuses to employ an attorney, the court shall appoint a public defender or another attorney to represent the person at public expenses. If an attorney other than a public defender is appointed, the fee paid to the attorney shall be taxed as a court cost against the person.

Iowa Code § 902.9 (1999 Supp.)

The maximum sentence for any person convicted of a felony shall be that prescribed by statute or, if not prescribed by statute, if other than a class "A" felony shall be determined as follows:

* * *

5. A class "D" felon, not an habitual offender, shall be confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars. A class "D" felon, such felony being for violation of section 321J.2, may be sentenced to imprisonment for up to one year in the county jail.

Iowa Code § 903.1 (1999 Supp.)

* * *

2. When a person is convicted of an aggravated misdemeanor, and a specific penalty is not provided for, the maximum penalty shall be imprisonment not to exceed two years. There shall be a fine of at least five hundred dollars but not to exceed five thousand dollars. When a judgment of conviction of an aggravated misdemeanor is entered against any person and the court imposes a sentence of confinement for a period of more than one year the term shall be an indeterminate term.

Iowa Rule of Criminal Procedure 2.19(9) (2003)

After conviction of the primary or current offense, but prior to pronouncement of sentence, if the indictment or information alleges one or more prior convictions which by the Code subjects the offender to an increased sentence, the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel. . . .